

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

|                          |   |                             |
|--------------------------|---|-----------------------------|
| UNITED STATES OF AMERICA | ) |                             |
|                          | ) |                             |
| Plaintiff/Respondent,    | ) |                             |
|                          | ) | Crim. Action No. 99-19-SLR  |
| v.                       | ) |                             |
|                          | ) | Civil Action No. 01-391-SLR |
| DEAN GARONE,             | ) |                             |
|                          | ) |                             |
| Defendant/Petitioner.    | ) |                             |
|                          | ) |                             |

---

Dean Garone, Safford Arizona. Petitioner pro se.

Colm F. Connolly, United States Attorney and Richard G. Andrews,  
Assistant United States Attorney, United States Attorney's  
Office, Wilmington, Delaware. Counsel for Respondent.

---

**MEMORANDUM OPINION**

Dated: December 4, 2002  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

Petitioner Dean Garone is an inmate at the Federal Correctional Institution in Safford, Arizona. Currently before the court is petitioner's application for habeas relief pursuant to 28 U.S.C. § 2255. (D.I. 99) Because the court finds that petitioner's claims are without merit, his petition for habeas relief is denied.

**II. BACKGROUND**

On September 1, 1999, petitioner pled guilty to one count of using a telephone to facilitate the possession of twenty-eight pounds of marijuana, in violation of 21 U.S.C. § 843(b), and one count of conspiracy to launder money, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) & (B)(i) and 18 U.S.C. § 371. (D.I. 54 at 18) On December 14, 1999, the court sentenced defendant to 87 months of imprisonment. (D.I. 55 at 17) On June 27, 2000, the Third Circuit affirmed petitioner's conviction. (D.I. 59) Petitioner did not seek a writ of certiorari to the Supreme Court. On March 21, 2001, petitioner filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255, however the motion

was subsequently withdrawn.<sup>1</sup> (D.I. 60, 64, 65) On May 29, 2001, petitioner filed the present petition. (D.I. 66-68)

### III. STANDARD OF REVIEW

After conviction and exhaustion, or waiver, of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. United States v. Frady, 456 U.S. 152 (1982); United States v. Shaid, 937 F.2d 228 (5th Cir. 1991). Prisoners in federal custody may attack the validity of their sentences via 28 U.S.C. § 2255. Section 2255 is a vehicle to cure jurisdictional errors, constitutional violations, proceedings that resulted in a "complete miscarriage of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780 (1979); see also U.S. v. Addonizio, 442 U.S. 178 (1979); United States v. Essig, 10 F.3d 968 (3rd Cir. 1993). "Generally if a prisoner's § 2255 [motion] raises an issue of material fact, the district court must hold a hearing to determine the truth of the

---

<sup>1</sup>Upon receipt of petitioner's pro se petition, the court gave notice to plaintiff that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applied, and would effectively preclude him from filing a second or subsequent habeas petition except in the most unusual of circumstances. (D.I. 61) Although petitioner returned the AEDPA election form indicating that he wished to withdraw his § 2255 petition without prejudice to file one all-inclusive petition in the future, the court filed the petition. (D.I. 62, 63) Petitioner notified the court that he had previously elected to withdraw his § 2255 petition. (D.I. 65) The court granted his request to withdraw the petition and dismissed it without prejudice. (D.I. 64)

allegations.” Essig, 10 F.3d at 976. A defendant is not entitled to a hearing if his allegations are contradicted conclusively by the record, or if they are patently frivolous. Solis v. United States, 22 F.3d 289 (3rd Cir. 2001). In the same vein, “[a] district court need not hold a hearing if the motion and files and records of the case show conclusively that the movant is not entitled to relief.” United States v. Melendez, No. CRIM 00-00069-01, CIV 01-3305, 2001 WL 1251462, at \*2 (E.D. Pa. Sept. 21, 2001) (citing Government of the Virgin Islands v. Forte, 865 F.2d 59 (3rd Cir. 1989)).

#### **IV. DISCUSSION**

Petitioner raises six grounds for relief in his habeas petition: (1) the court failed to rule on petitioner’s objections to portions of the Presentence Investigation Report (PSR), in violation of Fed. R. Crim. P. 32(c); (2) petitioner was wrongfully convicted under 21 U.S.C. § 843(b); (3) the court erred by granting an enhancement for a leadership role in two different offenses; (4) the evidence did not support a conviction for conspiracy to commit money laundering under 18 U.S.C. § 1956(a)(1)(B)(i); (5) the court improperly applied the Federal Sentencing Guidelines; and (6) petitioner received ineffective assistance of counsel.

##### **A. Fed. R. Crim. P. 32(c) Violation**

Petitioner alleges that the court violated Rule 32(c) of the Federal Rules of Criminal Procedure by failing to rule on his objections to the contents of the PSR. Specifically, petitioner claims that counsel objected to: (1) claims that petitioner was in the State of Delaware on August 22, 1996; (2) Michael Cardoso's version of events; and (3) the offense level for the money laundering offense. (D.I. 66, 67)

Rule 32 provides as follows:

At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on **any unresolved objections** to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

Fed. R. Crim. P. 32 (emphasis added).

Petitioner's argument is without merit since the information he refers to cannot be construed as unresolved objections under Rule 32(c). Petitioner claims that counsel objected to the contents of paragraph 17 of the PSR. (D.I. 66 at 2) Petitioner's counsel noted these objections in a letter to the United States Probation Officer. (D.I. 73, Ex. 1) Accordingly,

the officer amended the PSR by inserting the following sentence: "According to defense counsel, the defendant was not in Delaware on August 22, 1996, and never told Michael Cardoso the events as described above."

During the change of plea hearing on September 1, 1999, the government described the facts it would be prepared to prove had this case gone to trial, which included Michael Cardoso's version of events. (D.I. 54 at 12-16) Immediately thereafter, petitioner's counsel requested permission to clarify the government's representations. (Id. at 16, 17) She stated that the clarifications "[do] not go to the elements of the offense." (Id.) She concluded, "However, we are not denying at all that we used the telephone to have the drugs sent." (Id.) Furthermore, the court asked petitioner whether he "strongly disagree[d] with any of the government's representations", and he replied "no." (Id.) Petitioner's agreement to the clarified representations negates a finding of "unresolved objections" as defined in Fed. R. Crim. P. 32(b)(6).

Petitioner further claims that counsel objected to the offense level for the money laundering offense. Statements made by petitioner's counsel cannot be construed as Rule 32 objections. Counsel merely argued additional grounds for a downward departure. (D.I. 55 at 4, 5) Thus, there was no objection upon which the court was required to rule.

Furthermore, petitioner's argument is procedurally waived. He failed to raise these supposed errors at sentencing or on direct appeal. Under Essig, petitioner is required to demonstrate both cause and prejudice for this failure. 10 F.3d at 979. Even if petitioner alleges that counsel was ineffective in failing to raise these issues, he has not alleged any prejudice. Regardless, defense counsel told the court that this dispute was immaterial for sentencing guidelines purposes. (D.I. 54) Accordingly, the court did not violate Rule 32(c) by failing to rule on petitioner's objections.

**B. Wrongful Conviction Under 21 U.S.C. § 843(b)**

Petitioner alleges that he was wrongfully convicted under 21 U.S.C. § 843(b) because all elements of this crime were not proven beyond a reasonable doubt. (D.I. 66 at 3) U.S.C. § 843 (b) provides as follows:

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of **any act or acts constituting a felony** under any provision of this subchapter or subchapter II of this chapter.

(Emphasis added)

Specifically, petitioner argues that the indictment did not mention the amount of marijuana that he possessed and, thus, the commission of the underlying felony was not proven. (D.I. 66 at 3, 4) Furthermore, he states that not all possession with intent

to distribute marijuana cases are felonies, and cites 21 U.S.C. § 841 as an example in which the possession of marijuana is treated as a misdemeanor. (Id.) Thus, petitioner claims that he has not committed an underlying felony required to sustain a conviction under 21 U.S.C. § 843(b). (Id.)

Petitioner's arguments are without merit. Although he correctly stated that the indictment did not specify the amount of marijuana he possessed, he failed to mention that he waived prosecution by indictment and consented to prosecution by information. (D.I. 32) The information specifically stated that petitioner "did intentionally use and cause to be used a communication facility, to wit, Federal Express, in possessing with intent to distribute about 28 pounds of marijuana, a Schedule I controlled substance, in violation of 21 U.S.C. § 843(b)." (D.I. 31) Petitioner's argument that his charging document lacked an amount of marijuana is not supported by the record.

Petitioner's claim that his act of possession with intent to distribute marijuana is not a felony, but a misdemeanor, is also erroneous. The statute provides that "any person who violates subsection (a) of this section by distributing a small amount of marijuana for no remuneration shall be treated" as though the crime was a misdemeanor. 21 U.S.C. § 841(b)(4). Otherwise, possession of marijuana is a felony. Id. Courts have held that



seemingly minor amounts of marijuana are more than a "small amount" of marijuana. See United States v. Carmichael, 155 F.3d 561, 1998 WL 390973 (4th Cir. 1998) (unpublished decision) (1.256 grams of marijuana brought into prison is not a small amount); United States v. Damerville, 27 F.3d 254 (7th Cir. 1994) (17.2 grams of marijuana distributed to inmates is not a small amount); United States v. Wheeler, 121 F.3d 702 1997 WL 436737 (4th Cir. 1997) (unpublished decision) (2.86 grams of marijuana is not a small amount). Accordingly, possession of 28 pounds of marijuana is greater than a "small amount;" petitioner's acts constitute the underlying felony required to sustain a conviction under 21 U.S.C. § 843(b).

### **C. Enhancement For a Leadership Role**

Petitioner contends that the Federal Sentencing Guidelines do not permit him to receive an enhancement for a leadership role in two different offenses. This argument is procedurally defaulted because claims of error under the Federal Sentencing Guidelines are not cognizable under § 2255 unless they were previously raised on direct appeal. See Graziano v. United States, 83 F.3d 587 (2nd Cir. 1996). The court will not review petitioner's claim because he failed to raise it on direct appeal.

**D. Insufficient Evidence Under 18 U.S.C. § 1956(a) (1) (B) (i)**

Petitioner argues that the evidence is insufficient to support a conviction for conspiracy to commit money laundering under 18 U.S.C. § 1956(a) (1) (B) (i). This is not the type of claim that can be raised in a § 2255 proceeding. See United States v. Timmreck, 441 U.S. 780 (1979). Because petitioner pled guilty to this charge, he waived his right to challenge the conviction on non-jurisdictional grounds other than the voluntariness of the plea or ineffective assistance of counsel. See United States v. Broce, 488 U.S. 563 (1989). The court will not review petitioner's claim of insufficiency of evidence.

**E. Imposition of Consecutive Sentences**

To the extent petitioner is claiming that the court erred by imposing consecutive sentences, that claim may not now be relitigated under 28 U.S.C. § 2255. The Third Circuit addressed this issue on direct appeal, and affirmed the judgment of the district court. (D.I. 59) Thus, a subsequent review by this court is improper. See Withrow v. Williams, 507 U.S. 680 (1993) ("If the claim was raised and rejected on direct review, the habeas court will not readjudicate it absent countervailing equitable considerations.").

**F. Ineffective Assistance of Counsel**

The Sixth Amendment guarantees an accused the assistance of counsel in all criminal proceedings, and the Supreme Court has interpreted this right to mean the effective assistance of counsel. See Strickland v. Washington, 464 U.S. 668 (1984). Accordingly, a defendant claiming ineffective assistance of counsel must show (1) that counsel's performance was deficient, and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 686, 694. In the context of challenging a guilty plea based on ineffective assistance, a defendant must show (1) that counsel's performance was deficient, and (2) a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). In determining whether counsel's conduct was deficient, the court must consider the totality of the circumstances of the case and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688, 689.

Petitioner alleges that he was denied effective assistance of counsel on three grounds: (1) counsel failed to properly investigate all claims made by and through the government; (2) counsel did not make a Fed. R. Crim. P. 32(c) objection; and (3) counsel did not make an objection to the § 843(b) conviction.

(D.I. 66)

All three of petitioner's claims fail. Petitioner's first claim is merely conclusory, as it neither specified the particular actions that counsel failed to take, nor the resulting prejudice. Although petitioner's second and third claims are more specific, they must also fail. As previously discussed, the record did not contain any unresolved objections as per Rule 32(c), and the § 843(b) conviction was upheld as proper. Therefore, counsel's performance cannot be held deficient for failing to challenge the validity of these issues. Furthermore, petitioner has not demonstrated how the court's failure to consider these claims will otherwise result in a fundamental miscarriage of justice. Accordingly, the court is procedurally barred from considering this claim of ineffective assistance of counsel.

## **V. CONCLUSION**

For the reasons stated, petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is denied. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

|                          |   |                             |
|--------------------------|---|-----------------------------|
| UNITED STATES OF AMERICA | ) |                             |
|                          | ) |                             |
| Plaintiff/Respondent,    | ) |                             |
|                          | ) | Crim. Action No. 99-19-SLR  |
| v.                       | ) |                             |
|                          | ) | Civil Action No. 01-391-SLR |
| DEAN GARONE              | ) |                             |
|                          | ) |                             |
| Defendant/Petitioner     | ) |                             |

**O R D E R**

At Wilmington this 4th day of December, 2002, consistent with the memorandum opinion issued this same day:

IT IS ORDERED that:

1. Petitioner's application for habeas corpus relief (D.I. 66) filed pursuant to 28 U.S.C. § 2255 is dismissed and the writ denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3rd Cir. Local Appellate Rule 22.2 (1998).

Sue L. Robinson  
UNITED STATES DISTRICT JUDGE